



**ASSEMBLY SUBSTITUTE AMENDMENT 2,
TO 1997 ASSEMBLY BILL 235**

May 5, 1998 - Offered by Representative DUFF.

1 **AN ACT to create** 299.94 and 905.20 of the statutes; **relating to:** creating a
2 privilege for environmental audits, providing immunity for disclosures related
3 to environmental audits and providing a penalty.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

4 **SECTION 1.** 299.94 of the statutes is created to read:

5 **299.94 Immunity for disclosures. (1) DEFINITIONS.** In this section:

6 (a) "Environmental audit" has the meaning given in s. 905.20 (1) (a).

7 (b) "Environmental requirement" has the meaning given in s. 905.20 (1) (b).

8 **(2) DISCLOSURE IMMUNITY.** (a) A person who voluntarily discloses information
9 relating to an actual or potential violation of an environmental requirement to the
10 department shall be immune from the imposition of a civil or criminal penalty that
11 could be imposed for the violation if all of the following apply:

1 1. The voluntary disclosure is made within 45 days after the person knew, on
2 the basis of information obtained during an environmental audit, that an actual or
3 potential violation occurred.

4 2. The person making the disclosure initiates an appropriate and good faith
5 effort to achieve compliance, pursues compliance with due diligence and promptly
6 corrects the noncompliance or condition after discovery of the violation. If evidence
7 shows that the noncompliance is the failure to obtain a permit, an appropriate and
8 good faith effort to achieve compliance may be demonstrated by the submittal of a
9 complete permit application within a reasonable time.

10 3. The person cooperates with any reasonable request by the department in any
11 investigation that results from the disclosure.

12 4. The environmental audit occurs before the person is made aware that he or
13 she is under investigation by a regulatory agency for actual or potential violations
14 of environmental requirements.

15 5. Prior to beginning an environmental audit, the person that requested the
16 environmental audit notified the department in writing of the date on which the
17 environmental audit would begin, the site or facility or activity or management
18 system related to a site or facility to be audited and the general scope of the
19 environmental audit. The department may not reveal to any person that the
20 department has received a notice under this subdivision or the contents of any notice
21 received under this subdivision.

22 6. At the time that the voluntary disclosure is made to the department, the
23 person making that disclosure provides the department with information showing
24 that the conditions specified in this paragraph have been satisfied.

1 (b) If the person who voluntarily discloses information under par. (a) is a
2 governmental unit, as defined in s. 939.648 (1), or a business entity, the immunity
3 under this subsection applies to a director, officer, official, shareholder, trustee and
4 managing employe, as defined in s. 49.498 (1) (e), of that person and to an employe
5 of that person if the employe consents in writing to the disclosure.

6 **(3) EXCEPTIONS.** A penalty may be imposed notwithstanding sub. (2) if any of
7 the following applies:

8 (a) The information disclosed under sub. (2) is required to be reported under
9 a specific permit, license or approval condition or under an order issued by the
10 department.

11 (b) The violation resulted in serious harm or in imminent and substantial
12 endangerment to human health or the environment.

13 (c) Within 3 years before the disclosure, the person making the disclosure has
14 been found by a court or administrative law judge to have knowingly committed a
15 criminal act or committed serious violations that constitute a pattern of continuous
16 or repeated violations of environmental requirements, settlement agreements,
17 consent orders or judicial orders that were due to separate and distinct events giving
18 rise to the violations. In determining whether a person has a pattern of continuous
19 or repeated violations under this paragraph, the trier of fact shall base the decision
20 on the compliance history of the specific facility involved in the disclosure.

21 (d) The violation resulted in a substantial economic benefit that gave the
22 violator a clear advantage over its business competitors.

23 (e) The violation is of an administrative or judicial order.

24 **(3m) DEPARTMENTAL RESPONSE.** If the conditions of a voluntary disclosure under
25 sub. (2) (a) are not met but a good faith effort was made to voluntarily disclose and

1 resolve a violation detected in an environmental audit, the department shall
2 consider the nature and extent of any good faith effort in deciding the appropriate
3 enforcement response and shall mitigate any civil penalties based on a showing that
4 one or more of the conditions under sub. (2) (a) were met.

5 (4) CRIMINAL PENALTIES. Immunity provided for in this section does not apply
6 to any criminal penalties if the owner or operator of a site or facility recklessly or
7 knowingly committed a criminal act.

8 (5) BURDEN OF PROOF. When the department commences an enforcement action
9 against any person covered under sub. (2) for a violation of an environmental
10 requirement based in whole or in part on information contained in an environmental
11 audit and disclosed to the department, the disclosure shall be presumed to be
12 voluntary. The person claiming that a disclosure is voluntary shall provide the
13 supporting information required under sub. (2) (a), including information showing
14 that an appropriate and good faith effort to achieve compliance has been undertaken
15 with due diligence and that action was promptly taken to achieve compliance in the
16 period of time since the date of the disclosure. The department has the burden of
17 proving by a preponderance of the evidence that a penalty may be imposed because
18 the disclosure was not voluntary, because any of the conditions under sub. (2) (a) were
19 not met or because one of the exceptions under sub. (3) applies.

20 **SECTION 2.** 905.20 of the statutes is created to read:

21 **905.20 Environmental audit privilege.** (1) DEFINITIONS. In this section:

22 (a) "Environmental audit" means an evaluation of a site or facility or of an
23 activity or management system related to a site or facility, if the evaluation meets
24 all of the following criteria:

25 1. Is conducted by or at the request of the owner or operator of the site or facility.

1 2. Is not required under a specific permit, license or approval condition or under
2 an order issued by the department of natural resources.

3 3. Is undertaken for the purpose of identifying, documenting and improving
4 compliance with environmental requirements, to identify an environmental hazard,
5 contamination or other adverse environmental condition, or to improve an
6 environmental management system or process.

7 4. Is completed within a reasonable time after beginning the evaluation, but
8 not to exceed 6 months after the notification under sub. (2) (b) is sent, unless an
9 extension is granted by the department of natural resources.

10 (am) “Environmental audit report” means a document or record or a set of
11 documents or records, each labeled at the time of creation of the document or record,
12 “environmental audit report: privileged document” and created as the result of an
13 environmental audit and includes supporting information and an implementation
14 plan that addresses, as appropriate, correcting past noncompliance, improving
15 current compliance, improving an environmental management system and
16 preventing future noncompliance.

17 (b) “Environmental requirement” means a federal, state or local environmental
18 law, including any rule, regulation, ordinance, permit, license, approval or special
19 order issued under those laws. State environmental laws include chs. 160 and 280
20 to 299 and s. 166.20.

21 (c) “Supporting information” means any collection of data or material in any
22 format, including field notes, records of observations, findings, opinions,
23 suggestions, conclusions, drafts, memoranda, reports, drawings, photographs and
24 computer generated or electronically recorded data, maps, charts, graphs and

1 surveys, if that data or material was created or prepared for the primary purpose and
2 in the course of or as a result of an environmental audit.

3 (2) GENERAL RULE OF PRIVILEGE. (a) An owner or operator of a site or facility has
4 a privilege to refuse to disclose and to prevent any other person from disclosing any
5 environmental audit report related to the owner's or operator's site or facility. This
6 privilege is in addition to any other privilege provided under this chapter. This
7 privilege may be claimed in any civil action or administrative proceeding, including
8 a contested case, as defined in s. 227.01 (3).

9 (b) Prior to beginning an environmental audit, the person that requested the
10 environmental audit shall notify the department of natural resources in writing of
11 the date on which the environmental audit will begin, the site or facility or activity
12 or management system related to a site or facility to be audited and the general scope
13 of the environmental audit. The department of natural resources may not reveal to
14 any person that the department has received a notice under this paragraph or the
15 contents of any notice received under this paragraph.

16 (c) Disclosure of any part of an environmental audit report to any of the
17 following does not waive the privilege under this section:

18 1. An employe, agent, successor, assignee, director or shareholder of the owner
19 or operator of the site or facility.

20 2. An attorney of the owner or operator of the site or facility.

21 3. An independent contractor retained by the owner or operator of the site or
22 facility to review an issue raised as a result of the environmental audit.

23 4. A partner or lender of the owner or operator of the site or facility or a person
24 whom the owner or operator is currently negotiating with regarding partnership,
25 transfer of ownership or lending of money.

1 5. A state or federal official or employe under the terms of an agreement
2 between a state or federal agency and the owner or operator of the site or facility.

3 6. The department of natural resources if the disclosure meets the conditions
4 under s. 299.94 (2) (a).

5 **(3) WHO MAY CLAIM THE PRIVILEGE.** (a) The privilege may be claimed by the
6 owner or operator of the site or facility. If the owner or operator of the site or facility
7 is a governmental unit, as defined in s. 939.648 (1), or a business entity, the privilege
8 may be claimed by a director, officer, official, shareholder, trustee or managing
9 employe, as defined in s. 49.498 (1) (e), or by any other employe. The authority to
10 claim the privilege under this paragraph is presumed without evidence to the
11 contrary.

12 (b) Any person who may otherwise claim a privilege under par. (a) retains the
13 right to claim the privilege in any civil or administrative proceeding,
14 notwithstanding the use of an environmental audit in any proceeding under sub. (4)
15 (c) 1., in which the privilege does not apply.

16 **(4) EXCEPTIONS.** (a) The privilege does not apply if a court of record, after an
17 in camera review of the environmental audit report, including a statement listing
18 any activities undertaken as a result of the environmental audit to achieve
19 compliance with environmental requirements, determines that the person seeking
20 access to the environmental audit report proves by a preponderance of the evidence
21 any of the following:

22 1. That the privilege is asserted for a fraudulent purpose.

23 2. That the owner or operator of the site or facility failed to take the appropriate
24 responses necessary to achieve compliance within a reasonable time after any
25 noncompliance was discovered as the result of an environmental audit, but not

1 exceeding 3 years after the discovery. The department of natural resources may
2 extend the time to achieve compliance beyond the 3-year limit in an order scheduling
3 compliance if the department determines that acceptable progress is being made in
4 achieving compliance.

5 3. That the environmental audit report provides information about a site or
6 facility that constitutes a violation of an environmental requirement and that the
7 violation was committed with knowledge by an owner or operator of the site or facility
8 that the site or facility violated an environmental requirement.

9 (b) The privilege does not apply to any of the following:

10 1. Documents, communication, data, reports or other information required to
11 be made available or reported to a regulatory agency or any other person by statute,
12 rule, ordinance, permit, license, approval, order or consent agreement, or as
13 otherwise provided by law.

14 2. Information obtained by the observation, sampling or monitoring conducted
15 by a state or federal agency that regulates compliance with federal environmental
16 requirements.

17 3. Information legally obtained from a source independent of an environmental
18 audit.

19 (c) The privilege does not apply in any of the following:

20 1. An action for contribution or indemnity under an insurance contract.

21 2. A criminal investigation.

22 **(5) PENALTIES.** A person who uses this section to commit fraud may be fined not
23 more than \$25,000.

24 **SECTION 3. Nonstatutory provisions.**

